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Attorney at Law

August 29, 2019

For Settlement Purposes Only

City of Providence
City Council Claims & Pending Suits Committee
c/o Councilman Nicholas J. Narducci, Jr.
444 Westminster Street
Providence, RI 02903

Re: Sybil Bailey — Separation from Employment

Dear Councilman Narducci:

I represent Sybil Bailey as it pertains to her employment separation from the City of Providence. Please direct all future communications regarding Ms. Bailey to my attention. In the event the City of Providence maintains employment practices liability insurance coverage, kindly forward a copy of this letter to the City's insurance carrier.

I have reviewed the circumstances surrounding Ms. Bailey's employment separation and, I believe, there is more than sufficient evidence and compelling reason to demonstrate that the City of Providence has violated her rights under both state and federal law. The purpose of this letter is two-fold: (1) to put the City of Providence on notice pursuant to R.I.G.L. § 45-15-5 of Ms. Bailey's claim for discrimination on the basis of sex, age and race, and her claims of violation of her due process rights, defamation of character and whistleblower protections; and (2) to inform you that unless a satisfactory settlement agreement is reached, Ms. Bailey will take legal action against the City of Providence and its agents in the appropriate legal forum.

FACTUAL BACKGROUND

As you know, Ms. Bailey worked for the City of Providence for almost 17 years as its Director of Human Resources. During Ms. Bailey's tenure with the City, she was involved in numerous labor and employment-related issues involving both unionized and non-union employees of the City. The breadth of her knowledge, experience and involvement in the City's Human Resources area spanned every conceivable issue whether it was contract negotiations, discrimination complaints, harassment issues or the daily concerns of hiring and personnel issues that arise among the City's workforce. In her years as Director of Human Resources, Ms. Bailey consistently performed at a high level of excellence, not only representing the City's interests with impeccable instincts and knowledge for what was the best and most proper course of action on behalf of the City, but was consistently putting out fires and, through her knowledge and

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ability to assess people and situations, sidelining situations before they became problems. Ms. Bailey's performance as the City's Director of Human Resources was always of the highest caliber and there were never any issues or concerns with her job performance or integrity voiced by any of the four administrations with whom she has worked.

Ms. Bailey's employment with the City ended on February 4, 2019. On January 28, 2019, Ms. Bailey met with Sabrina Solares-Hand, Director of Operations and Nicole Pollock, Chief of Staff to Mayor Jorge Elorza. While Ms. Bailey thought that this meeting was simply a regularly scheduled meeting to discuss ongoing projects and issues, she was surprised when Ms. Solares-Hand opened the conversation by accusing Ms. Bailey of wrongful conduct in violation of City regulations and policies. Specifically, Ms. Solares-Hand accused Ms. Bailey of using her position inappropriately to refer her friends and/or relatives to City Directors for employment. In addition, Ms. Solares-Hand accused Ms. Bailey of providing answers to pre-employment testing to a relative of hers. Knowing that these allegations of wrongdoing were not only inaccurate but fabricated, Ms. Bailey attempted to defend herself before Ms. Solares-Hand and Ms. Pollock's accusations. Despite Ms. Bailey's protestations and explanations that clearly demonstrated the lack of substantive foundation and evidentiary basis for these improper claims, both Ms. Solares-Hand and Ms. Pollock were not interested in listening to Ms. Bailey. Instead, they told her that the decision to terminate her employment had already been made and that there was no discussion to be had or ability to change the decision. As Ms. Bailey knew that she had not engaged in any conduct that could be viewed as inappropriate or in violation of City policies or regulations, it was clear that this conversation was simply a pretext for more insidious conduct and action by the City.

In fact, on more than one occasion, Ms. Bailey had spoken with Ms. Solares-Hand concerning inappropriate conduct/racist and disparaging comments about hispanics and other minorities made by several City employees to her during the course of her employment. These comments/behaviors, including the use of the "N" word by a City Director, was deeply disturbing to Ms. Bailey as a person of color as well as the City's Human Resources Director. What was more troubling, however, was the reaction of the administration and, in particular, Ms. Solares-Hand, when Ms. Bailey informed her of these inappropriate and racially charged comments and sought to have this conduct stopped. Instead of being horrified, Ms. Solares-Hand dismissed the behavior as "no big deal" and that the director "didn't really mean any harm" by these comments. As you can imagine, this cavalier response to such egregious and racist behavior was stunning to Ms. Bailey. In addition to the administration's failure to act against racially insensitive comments made and actions taken by employees of the City, it was also clear to Ms. Bailey that her sex and age were a problem for the administration. Specifically, upon her being notified of her termination, the City appointed a young Hispanic man with no human resources experience or qualifications to assume Ms. Bailey's position as Director of Human Resources.

In short, Ms. Bailey's efforts to convince Ms. Solares-Hand and Ms. Pollock to reconsider her termination decision proved futile and she was forced to resign her position

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effective February 4, 2019. While the parties were able to negotiate a severance package that was, in all ways, similar to other severance agreements that the City had entered into with other employees it had terminated who were similarly situated in status and rank to Ms. Bailey, the severance agreement was never formally finalized as it was rejected by a majority of the Claims Committee upon presentation by the City. We believe this action by the Committee was both discriminatory and retaliatory against Ms. Bailey.

POTENTIAL CLAIMS

Based on the above course of conduct, Ms. Bailey intends to pursue claims for damages against the City of Providence in the appropriate legal forum. Following is a non-exhaustive list of her claims.

I. SEX, AGE and RACE/COLOR DISCRIMINATION

- VIOLATION OF THE R.I. FAIR EMPLOYMENT PRACTICES ACT, R.I. GEN. LAWS § 28-5-1 ET. SEQ.;
- VIOLATION OF THE RHODE ISLAND CIVIL RIGHTS ACT OF 1990, R.I. GEN. LAWS § 42-112-1 ET. SEQ.; AND
- VIOLATION OF TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, 42 U.S.C. § 2000e

It is illegal for an employer to terminate an employee “because of sex” or on the “basis of sex.” RI. Gen. Laws § 28-5-7; RI. Gen. Laws § 42-112-1; and 42 U.S.C. 5 2000e-2.

Furthermore, both state and federal law define “because of sex” or on the “basis of sex” identically:

The terms “because of sex” or “on the basis of sex” include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in section 2000e-2 (h) of this title shall be interpreted to permit otherwise.

42 U.S.C. § 2000e(k).

“Because of sex” or “on the basis of sex” include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions, and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment related purposes, including receipt of benefits

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under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in this chapter shall be interpreted to permit otherwise.

R.I. Gen. Laws 28-5-6(4)

Here, there is indisputable evidence that the true reason the City of Providence terminated Ms. Bailey's employment is because of her sex, age and race.

In addition to discrimination on the basis of sex and race, Ms. Bailey was also in a protected age class at the time of her termination. Indeed, her termination and replacement by a younger, lower paid worker, establishes a *prima facie* case of age discrimination under the FEPA. Moreover, the City's patently false attempt to justify Ms. Bailey's termination, is nothing more than a pretext to replace her with a younger, lower paid and less experienced employee, which further supports an inference of discriminatory conduct. This is particularly true where, as here, the proper justification for the termination is implausible or dishonest. See *Green v New Mexico*, 420 F.3d 1189, 11923-1193 (10th Cir. 2005) ("A plaintiff can show pretext by revealing such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable fact finder could rationally find them unworthy of credence); see also *Miller v Eby Realty Group, LLC*, 396 F.3d 1105, 1111 (10th Cir, 2005) ("Pretext exists when an employer does not honestly represent its reasons for terminating an employee."). Obviously, an abrupt termination after a long and loyal service, without prior notice, warning or opportunity to correct any purported deficiency—or even to provide an opportunity for an explanation—is an adverse employment action which gives rise to a compelling inference of discriminatory animus. Discriminatory intent may also be established where, as here, an employer fails to follow its own policy and procedures relative to, among other things, employee discipline and performance improvement. Adverse employment actions based in whole or even in part on account of age is a violation of the above-cited employment law provisions. For the same reasons, the above facts also give rise to claims under the RICRA.

As I am sure you are also aware, discrimination on the basis of race/color is also a violation of the above-mentioned state and federal laws. Specifically, it is against the law to terminate someone's employment based on his/her race/color. See *Gates v. Chicago Board of Education*, 916 F.3d 631 (7th Cir. 2019); *Castleberry v. STI Group*, 863 F.3d 259 (3rd Cir. 2017). It is clear that the conduct described hereinabove is both severe and pervasive and satisfies the legal standards for creating a discriminatory and hostile work environment on the basis of race/color.

The City is also exposed by its action that constitute race/color discrimination against Ms. Bailey. It is apparent, based on the City's conduct both in replacing Ms. Bailey and in failing to address the racially charged atmosphere she had to endure, that the City has acted in a racially insensitive manner and has allowed conduct from its employees that amounts to race/color discrimination in violation of the FEPA, RICRA and Title VII.

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As with Ms. Bailey's sex and age discrimination claims, she will be able to easily demonstrate a *prima facie* case of race/color discrimination against the City. Further, since it is abundantly clear that the proffered reason for Ms. Bailey's unceremonious exit from the City, her alleged wrongful conduct in hiring City employees, is both false and malicious, Ms. Bailey will have little trouble in demonstrating that the City's reason was a pretext for race/color discrimination. This will be even more apparent when the evidence of the City ignoring Ms. Bailey's entreaties to rectify the racially charged environment in the City were ignored by members of the Mayor's executive staff.

In addition to the above claims of discrimination on the basis of sex, age and race, Ms. Bailey also has strong claims against the City for violations of due process, defamation and whistleblowing.

As I am sure you are aware, public employees are generally entitled to a due process hearing under the law. See *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985). A public employee has a constitutionally protected property interest in her continued employment when she reasonably expects that her employment will continue. *Cummings v. S. Portland Housing Authority*, 985 F.2d 1, 2 (1st Cir. 1993). As a general rule in Rhode Island, "courts recognize a claim to entitlement if the employee establishes that a statute, rule, or contract grants a right to continued employment, absent a showing of cause." *Salisbury v. Stone*, 518 A.2d 1355, 1360 (R.I. 1986). *See also, Kells v. Town of Lincoln*, where the Rhode Island Supreme Court held that a police chief was entitled to a specification of charges, notice and a hearing before termination because the applicable ordinance provided that removal would only be for cause and his employment contract was for a 3-year term. 874 A.2d 204, 212-13 (R.I. 2005). We believe Ms. Bailey had a legitimate expectation of continued employment that could only be ended by cause pursuant to the City Charter. As such, Ms. Bailey was entitled to a due process hearing that was not a sham and where the principals had not already concluded that her employment would end. In other words, Ms. Bailey was entitled, at a minimum, to notice and an opportunity to be heard regarding the alleged reasons for her employment ending under *Loudermill*. She received neither of these requirements. Instead, she was summarily called to Ms. Solares-Hand's office for a meeting, the details of which she was not aware, was blindsided and confronted with false, inaccurate and slanderous information and was provided with no legitimate opportunity to, in any meaningful way, respond to the claims being leveled against her. Further, Ms. Solares-Hand made it clear that no matter what Ms. Bailey said it would not matter as "the decision had already been made" to end her employment. This conduct is a classic violation of Ms. Bailey's due process rights. While the City may be able to correct this error, its failure to afford Ms. Bailey her due process rights means she is entitled to all her back pay and benefits from the day of her discharge until the error is corrected by the City. See *Waterbury v. City of East Providence*, 197 F.Supp.3d 379 (D.R.I. 2016).

As mentioned above, the City and Ms. Bailey entered into a severance agreement just prior to the end of her employment. This document provided for, among other things, a non-disparagement clause. This provision was designed to make sure that neither party said or provided information about the other party that was malicious or defamatory. While Ms. Bailey kept her part of the bargain regarding this clause (notwithstanding the fact that the severance

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agreement was not approved by the Claims Committee), the City and its representatives have not done the same. Instead, the City allowed unfounded innuendo and rumors about Ms. Bailey and the reason she left her employment with the City to run rampant through the press and City Hall, all of which were untrue and detrimental to Ms. Bailey's reputation. In fact, you were quoted in several articles as engaging in unwarranted unsubstantiated speculation about the reason for Ms. Bailey's leaving the City. This type of conduct on the part of the City and its representatives clearly demonstrates an intent to slander Ms. Bailey's good name and reputation in violation of existing law.

Finally, Ms. Bailey was the victim of retaliatory conduct on the part of the City for engaging in her protected right to act as a whistleblower against wrongful conduct she was aware of in the City. See R.I.G.L. 28-50, the Rhode Island Whistleblowers' Protection Act. Specifically, and as previously mentioned, Ms. Bailey brought to Ms. Solares-Hand's attention conduct which Ms. Bailey knew or reasonably believed to be in violation of the laws and regulations of the State and the City. Instead of promptly acting on this information, Ms. Solares-Hand dismissed Ms. Bailey's reporting of racially motivated conduct in violation of the FEPA and the City's ordinances and ignored these reported concerns. It was only a relatively short time later that Ms. Solares-Hand notified Ms. Bailey that her employment with the City was ended. We believe that the proximity of Ms. Bailey reporting illegal and wrongful conduct to Ms. Solares-Hand, conduct engaged in by a powerful and connected department director, and Ms. Solares-Hand's decision to ignore Ms. Bailey's reporting and protect the individual and the subsequent end of Ms. Bailey's employment is not a coincidence, but retaliation for her actions in reporting this racially charged conduct. This action by the City is evidence of a violation of R.I.G.L. 28-50-3(1).

DAMAGES

A plaintiff who succeeds on a discrimination claim is entitled to an award of back pay, compensatory damages, costs, attorneys' fees, interest, and punitive damages. Moreover, plaintiffs in discrimination cases are not required to provide medical support for an award of compensatory damages. See *Meriweather v. Family Dollar Stores of Indiana, Inc.*, 103 F.3d 576, 580 (7th Cir. 1996) ("A plaintiff's testimony about emotional distress may, in certain instances, of itself suffice to support an award for nonpecuniary loss."); *Turk v. Holland Hospitality, Inc.*, 85 F.3d 1211, 1215 (6th Cir. 1996) ("It is well settled that Title VII plaintiffs can prove emotional injury by testimony without medical support."). Furthermore, there is no cap on awards for compensatory damages under Rhode Island law.

Punitive damages may be awarded in circumstances "where the challenged conduct is shown to be motivated by malice or ill will or when the action involves reckless or callous indifference to the statutorily protected rights of others," which the courts have interpreted to mean that the employer is acting "in the face of a perceived risk that its actions will violate [the law]." *Kolstad v. American Dental Ass'n*, 527 U.S. 526, 536 (1999). There is no cap on punitive damages under Rhode Island law. As such, the City stands liable for substantial money damages and attorneys' fees as the direct, intended and foreseeable result of its purposeful discrimination of my client.

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AWARD OF ATTORNEYS' FEES

In addition to a substantial award of both "compensatory" (humiliation and pain and suffering type) damages and statutory punitive damages, a prevailing employee may recover his or her reasonable attorneys' fees and costs. Accordingly, you need to understand that after my client prevails at trial, the City will be required to write three separate checks: (1) a check to Ms. Bailey for the amount of the jury award; (2) a check to your lawyer for defending the City; and (3) a check to me for my legal fees.

I need not explain to you that with respect to employment discrimination cases, the employer's own attorneys' fees (not including the additional amounts paid to settle the case) typically ranged from \$35,000 to \$80,000 in defense costs, depending on the stage at which the case was concluded and \$100,000 to \$150,000 if the case goes to trial. Indeed, the post-trial battle over attorneys' fees is often a very extensive (and very expensive) litigation campaign unto itself, involving hearings, motions, affidavits, experts, and depositions.

CONCLUSION

The City engaged in a clear violation of state and federal law when its agents terminated Ms. Bailey because of her sex, age and race/color. Furthermore, the City's conduct was also motivated by malice or ill will or with a reckless or callous indifference to Ms. Bailey's statutorily-protected right against discrimination because of her gender, age and race/color. As explained at length above, Ms. Bailey will secure jury trial deliberations to quantify her right to back-pay, front pay, uncapped emotional distress damages, uncapped punitive damages and ever-accruing and ever-increasing attorneys' fees. Interest on all recovered amounts (other than attorneys' fees) will accrue at the rate of 1% per month from the date of the unlawful conduct (February 4, 2019) to the date of final payment of the damages you will have to fund.

If progress toward a mutually acceptable settlement agreement is not soon undertaken, Ms. Bailey shall file a lawsuit against the City in Rhode Island Federal Court for discrimination on the basis of sex, age and race/color, denial of her due process rights, defamation and violation of the State Whistleblower statute.

However, recognizing the desirability of a speedy resolution of this matter, short of litigation, Ms. Bailey is willing to settle her claims on reasonable terms. To this end, Ms. Bailey will execute a mutual release of all existing and potential claims with the City in exchange for the following:

1. A lump sum payment in the amount of \$150,000 to be allocated for tax purposes in the manner most advantageous for each of the interested parties;
2. Health Insurance benefits paid for by the City for twelve (12) months from the date of settlement;
3. A letter placed in her personnel file stating at the time of her employment separation, she was an employee in good standing.

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Please be advised that the City has forty (40) days from the date of this letter to settle Ms. Bailey's claims pursuant to R.I. Gen. Laws § 45-15-5. In the event that Ms. Bailey's claims are not settled on or before the expiration of the forty (40) day period, Ms. Bailey will commence legal proceedings against the Treasurer for the City in the appropriate legal forum.

Very truly yours,



JEFFREY W. KASLE

cc: The Honorable Jorge O. Elorza
Councilman Michael J. Correia
Councilwoman Nirva R. LaFortune
Councilwoman Helen D. Anthony
Councilman James E. Taylor
Jeffrey Dana, Esq.
Ms. Sybil Bailey